

ARTICLE

AN UPRISING OF CIVILITY IN TEXAS

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I. INTRODUCTION

When people think of Texas and civility, the first thing that may come to mind might be the infamous YouTube clip titled “Texas Style Deposition.”¹ In that clip, Texas attorney Joe Jamail proceeds to call opposing counsel several profanities, as well as “fat boy,” and Mr. Jamail threatens to fight the witness he is deposing.²

This anecdotal episode, along with the misconception that the Texas legal system is equivalent to the “Wild West,” cast an unflattering and inaccurate picture of civility in the legal profession in Texas. In fact, efforts to increase and sustain civility in Texas are growing and flourishing. This Article will discuss several of the developments in Texas regarding civility. This Article will also provide suggestions on how civility can become even more ingrained in the state. Before going further, this Article discusses briefly what civility is, the advantages of civility in the legal profession, and the costs of incivility.

II. DEFINING CIVILITY: UNDERSTANDING ITS IMPORTANCE AND EXAMINING THE CONSEQUENCES OF INCIVILITY

Civility is typically defined as treating others with courtesy, dignity, and respect.³ The terms civility and professionalism are sometimes used interchangeably in the legal profession, as they

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1. Iowapublicdefender, *Texas Style Deposition*, YOUTUBE (June 27, 2007), <https://www.youtube.com/watch?v=ZIxmrVbMeKc> (audiovisual excerpt from a Joe Jamail deposition).

2. *Id.*

3. David A. Grenardo, *Making Civility Mandatory: Moving From Aspired to Required*, 11 CARDOZO PUB. L. POL’Y & ETHICS J. 239, 244–45 (2013).

refer to characteristics that all lawyers should aspire to demonstrate, such as honesty, integrity, punctuality, preparedness, and the ability to communicate with others using courtesy and respect in all written and oral communications.⁴ Civility and professionalism involve conduct that goes beyond what the ethical rules of each state require, which usually only call for the lowest common denominator of behavior to avoid sanctions.⁵

Former U.S. Supreme Court Justice Sandra Day O'Connor summarized a few of the major benefits of civility by stating, "More civility and greater professionalism can only enhance the pleasure lawyers find in practice, increase the effectiveness of our system of justice, and improve the public's perception of lawyers."⁶

Attorneys must understand that the "highest form of zealous advocacy embodies civility; it is not devoid of civility."⁷ Zealous advocacy can and should be "aggressive, robust, and adversarial, while also remaining civil."⁸

The importance of civility is most easily understood by looking at the deleterious effects of incivility. As an initial matter, uncivil conduct by attorneys creates a number of significant consequences for clients. For instance, a lawyer can lose a client's case because of incivility. "In a close case, civility may tip the scales toward a lawyer with a reputation for integrity, causing the uncivil lawyer's client to lose the case."⁹

Second, unnecessary fighting and arguing with opposing counsel can result in needless motions to compel that increase the costs of litigation for clients.¹⁰ These wasteful motions also severely strain the legal system by increasing the workload of judges who already face overwhelming dockets.¹¹

Third, incivility can also increase client costs during settlement. For example, if attorneys need to resolve a case through settlement and serve as the primary negotiators, then incivility can prolong or sabotage that process, again resulting in clients paying for more attorney billable hours to resolve the case or for trial if settlement negotiations fail.

4. See *id.* (quoting Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 109 (2012)).

5. *Id.* at 247.

6. Sandra Day O'Connor, *Professionalism*, 76 WASH. U. L.Q. 5, 8 (1998).

7. Grenardo, *supra* note 3, at 275.

8. *Id.* at 277.

9. Judith D. Fischer, *Incivility in Lawyers' Writing: Judicial Handling of Rambo Run Amok*, 50 WASHBURN L.J. 365, 369 (2011) (internal citations omitted).

10. See, e.g., *Redwood v. Dobson*, 476 F.3d 462, 466–67, 470 (7th Cir. 2007) (censuring one lawyer and admonishing another for bringing frivolous motions).

11. *Galle v. Orleans Parish Sch. Bd.*, 623 So. 2d 692, 696 (La. Ct. App. 1993).

Fourth, incivility also affects attorneys themselves. Deadlines and client expectations make the practice of law stressful. Anyone who has practiced long enough to deal with opposing counsel knows that an unnecessarily obstreperous or rude opposing counsel can make the life of a lawyer even more stressful. When attorneys treat others civilly, however, lawyers are more likely to enjoy the practice of law because they can focus on their cases rather than fighting needlessly with opposing counsel.

Moreover, uncivil attorneys who practice in a legal environment where civility is prevalent can suffer professional consequences. For example, Lamont Jefferson, a prominent partner in the international law firm of Haynes & Boone, LLP, contends that attorneys in San Antonio who continue to act unprofessionally and uncivilly despite urgings to act otherwise can be ostracized from the legal community.¹² This is true in many legal communities, particularly in smaller cities and towns, as attorneys who act uncivilly are quickly identified and typically shunned by other lawyers, judges, and non-lawyers.

Incivility also creates a negative public perception about attorneys who serve as representatives of the legal system, which is a system that should be based on justice and a fair process rather than a system of whose attorney screams the loudest or serves as the biggest irritant to opposing counsel.

III. CIVILITY IN TEXAS

Civility in Texas appears to be strong and on the rise. The following highlights the major developments and activities of civility in Texas.

A. *The Texas Chapter of the American Board of Trial Advocates' Efforts to Add Civility to the Oath*

The American Board of Trial Advocates ("ABOTA") is a national organization comprised of plaintiff's lawyers, defense counsel, and judges.¹³ ABOTA began a national movement to encourage each state's chapter of ABOTA to seek to add civility into their respective state attorney oaths.¹⁴ Several states have already added some type of civility language into their

12. Interview with Lamont A. Jefferson, Member, Am. Inns of Court, in San Antonio, Tex. (May 20, 2014).

13. AM. BOARD OF TRIAL ADVOC., <https://www.abota.org/index.cfm> (last visited July 30, 2014).

14. See William B. Smith, *Civility, Setting the Tone for Respect*, CIVILITY MATTERS, at 8, 11, available at <http://home.innsofcourt.org/media/12354/civilitymattersmagazine.pdf>.

attorneys' oaths, including South Carolina, Florida, Louisiana, Arkansas, New Mexico, and Utah.¹⁵

Texas' chapter of ABOTA ("TEX-ABOTA") is leading the movement to add civility into the attorney oath taken by all newly admitted attorneys in Texas. The draft bill that proposes to add civility into the oath states that "[e]ach person admitted to practice law . . . shall take an oath that the person will . . . *conduct himself with integrity and civility in dealing and communication with all parties*."¹⁶ Ultimately, TEX-ABOTA hopes to push the draft bill through the Texas legislature in 2015.

Adding civility into the Texas attorney oath would help infuse civility into the legal culture of Texas by focusing new attorneys on pledging their commitment and duty to act with civility.

Oaths are powerful tools. One legal commentator concluded that the attorney oath "can more clearly and accurately state the core ethical duties of a lawyer. In that way, the oath can better inspire lawyers to live up to the ideals of the profession."¹⁷

Not only does Texas attempt to inculcate civility into the profession through the attorney oath, but it also does so already through a mandatory course for all new attorneys.¹⁸

B. Texas Center for Legal Ethics and the Baker Course

In 1989, three retired chief justices of the Texas Supreme Court created the Texas Center for Legal Ethics ("TCLE") to "promote the values contained in the Texas Lawyers' Creed of Professionalism."¹⁹ The TCLE is an independent, non-profit

15. Lawyer's Oath, No. 2003-10-22-03 (S.C. 2003), *available at* <https://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2003-10-22-03>; *In re: Oath of Admission to the Fla. Bar*, No. SC11-1702 (Fla. 2011), *available at* <http://www.floridasupremecourt.org/decisions/2011/sc11-1702.pdf>; Lawyer's Oath, THE LOUISIANA SUPREME CT. COMMITTEE ON B. ADMISSIONS, https://www.lascba.org/lawyers_oath.asp (last visited July 30, 2014); *In re Attorney Oath of Admission*, 2012 Ark. 82 (2012), *available at* <http://statecasefiles.justia.com/documents/arkansas/supreme-court/2012-ark-82.pdf?ts=1330020058>; NEW MEXICO BOARD OF LAW EXAMINERS, R. 15-304, *available at* <http://www.nmexam.org/pdfs/Rules20130626.pdf>; UTAH JUDICIAL COUNCIL RULES OF JUDICIAL ADMINISTRATION AT PREAMBLE: A LAWYER'S RESPONSIBILITY, *available at* http://www.utcourts.gov/resources/rules/ucja/#Chapter_13.

16. See § 1 of TEX-ABOTA's proposed amendment to TEX. GOV'T CODE ANN. § 82.037 (West 2014) (on file with author).

17. Carol Rice Andrews, *The Lawyer's Oath: Both Ancient and Modern*, 22 GEO. J. LEGAL ETHICS 3, 50 (2009). ABOTA also promotes civility throughout the nation with its educational program called *Civility Matters. Professionalism Ethics and Civility*, AM. BOARD OF TRIAL ADVOCS., <https://www.abota.org/index.cfm?pg=ProfEthicsCivility> (last visited July 30, 2014). The *Civility Matters* program is presented at ABOTA activities, other bar and professional programs, and law schools. *Id.*

18. See *infra* notes 25–28 and accompanying text.

19. *About Us*, TEXAS CENTER FOR LEGAL ETHICS, <http://legalethictexas.com/About-Us.aspx> (last visited July 30, 2014).

corporation that provides “resources for ethics and professionalism by offering courses, speakers, symposia, and CLE seminars for the legal community and others.”²⁰

Jonathan Smaby, the Executive Director of the TCLE, recounted, “Th[e] tension between zealous advocacy and the need for civility in dispute resolution has always been with us, but it became a particularly pernicious problem for the legal profession in the 1980s . . . [because] nastiness and pettiness by some members of the bar” increased.²¹ Also, “[o]bstructionism, uncooperativeness, delay, and some other tactics became more prevalent, and some likened litigation to war, where the ends justified the means if it meant a win for the client.”²²

Smaby asserted that “Texas was one of the first states to recognize the problem and take steps to address it. In particular, it became apparent that the profession needed a collective understanding of where to draw the line between zealous advocacy and appropriate civility, which was not going to happen by itself.”²³

Smaby further observed in the *ABA Journal* that “[y]oung lawyers are hungry for information on the proper balance between advocacy and civility They want to do the right thing, but don’t know what the right thing is.”²⁴

For almost twenty years, one of the major functions of the TCLE has been teaching junior lawyers to do the right thing. By order of the Texas Supreme Court, TCLE is the sole provider of *The Justice James A. Baker Guide to the Basics of Law Practice Course*.²⁵ Since 1996, also by order of the Texas Supreme Court, “all newly licensed attorneys take [the Baker] seminar during their first year of practice. The half-day course is designed to bridge the gap between the law school classroom and real-world practice by using experienced lawyers and judges to educate new lawyers about what is expected of them.”²⁶ In particular, new attorneys are expected to demonstrate, among other things, professionalism, civility, and adherence to the Texas Lawyers’

20. *Id.*

21. Jonathan E. Smaby & Kelly Frels, *Twenty Years of the Texas Center for Legal Ethics*, 72 Tex. B. J. 838, 838 (2009), available at <https://www.legalethictexas.com/getattachment/d6d4165e-66fb-4324-b3b7-9fab40aab4ae/20th-Anniversary-of-the-Texas-Center-for-Legal-Eth.aspx>.

22. *Id.*

23. G.M. Filisko, *You’re Out of Order! Dealing with the Costs of Incivility in the Legal Profession*, A.B.A. J., Jan. 2014, at 33, 37, available at http://www.abajournal.com/magazine/article/youre_out_of_order_dealing_with_the_costs_of_incivility_in_the_legal/.

24. *Id.*

25. Order, Misc. Docket No. 96-9078 (Tex. 1996), available at <https://www.supreme.courts.state.tx.us/MiscDocket/96/96-9078.pdf>.

26. Smaby & Frels, *supra* note 21, at 839.

Creed, which will be discussed below.²⁷ To date, over 30,000 Texas lawyers have completed the Baker course, and that number will only continue to rise.²⁸

Just as the TCLE maintains a strong role in the uprising of civility in Texas, the American Inns of Court (the “AIC” or “Inns”) also play a special part in promoting civility in Texas.

C. *The Rise of American Inns of Court in Texas*

While Warren Burger served as the Chief Justice of the U.S. Supreme Court, he recognized “diminishing standards of work product and the decline of civility at the American bar.”²⁹ He encouraged American judges and lawyers to address these issues by replicating the English model of apprenticeship through Inns.³⁰ As a result, the first American Inn began in 1980 in Utah.³¹

Each Inn usually includes about 80 members, and the members are divided into groups that include a cross-section of judges, lawyers, law professors, and law students.³² During monthly meetings, each group will typically present on an interesting and current legal topic, and all of the members will either share a meal or enjoy fellowship in a reception-like social hour.³³ The AIC are “devoted to [the] promotion of professionalism, civility, ethics, and excellent legal skills at the American bench and bar.”³⁴ Mentoring is the foundation of an Inn’s existence.³⁵

In 2013, President of the AIC Foundation, Justice Donald W. Lemons, spoke about the importance of the Inns and civility:

[T]he American Inns of Court Foundation and the more than 360 Inns nationwide are dedicated to the honorable goal of recovering civility in the legal profession—a goal much more likely to be achieved when the values and practices that serve this end are demonstrated personally by other members of the profession. Nothing promotes this objective better than organized, focused, and committed mentoring programs.³⁶

27. *Id.*

28. *Id.*

29. Justice Donald Lemons, *Return to Civility: How the American Inns of Court Foundation Is Promoting Professionalism and Ethics Through Mentoring*, 76 TEX. B. J. 207, 207 (2013), available at <https://www.texasbar.com/Content/NavigationMenu/AboutUs/StateBarPresident/TransitionToPractice/ReturnToCivility.pdf>.

30. *Id.* at 207–08.

31. *Id.*

32. *See id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

AIC promote civility through mentoring within the Inns, but the Inns also support civility through other means. For instance, the AIC sponsor ABOTA's Civility Matters program. Also, AIC members, including Justice Douglas S. Lang of the Texas 5th District Court of Appeals and Lamont Jefferson, present on civility throughout the nation and statewide in Texas. In addition, members of Inns also promote civility through leading by example in their everyday practice.

Today, there are over 360 chartered Inns in the United States with more than 29,000 members participating.³⁷ Texas' increase in Inns has been impressive as well. The first Inn founded in Texas, the Garland R. Walker American Inn of Court, started in Houston in 1985.³⁸ Today, Texas houses approximately twenty active Inns across the state, including five in Dallas, four in Houston, three in Austin, and one in San Antonio, Fort Worth, Kilgore, Waco, Sherman, Beaumont, Lubbock, and Collin County.³⁹ There are currently over 2,000 members participating in Texas Inns, which has increased by nearly 400 members in the last three years.

The core aspect of Inns involves mentoring, and the State Bar of Texas also promotes mentoring new attorneys to create more civility and professionalism.

D. Transition to Practice Program

The State Bar of Texas recognized the importance of mentoring in fostering civility and professionalism by creating the Transition to Practice Program in 2009. In the program, newly licensed lawyers are mentored by experienced attorneys in many areas, including, but not limited to, law practice management and effective client representation.⁴⁰ The pairs meet once a month and alternate between attending CLE programs and meeting in small groups or one-on-one sessions.⁴¹ Promoting professionalism is a key component to the mentoring program.⁴²

37. *Id.*

38. *The Garland R. Walker American Inn of Court*, AM. INNS OF COURT, <http://home.innsofcourt.org/for-members/inns/the-garland-r-walker-american-inn-of-court.aspx> (last visited July 30, 2014).

39. *Find an Inn*, AM. INNS OF COURT, <http://home.innsofcourt.org/for-members/future-members/find-an-inn.aspx> (last visited July 30, 2014) (click the "State button," then select "Texas" from the drop down menu, then click "Search").

40. Blair McBride, *Transition to Practice: A Mentoring Initiative for Local Bar Associations Update*, 76 TEX. B. J. 217, 218 (2013), available at <http://www.texasbar.com/Content/NavigationMenu/AboutUs/StateBarPresident/TransitiontoPractice/Update.pdf>.

41. *Id.*

42. *See id.*

The Transition to Practice Program is thriving all over Texas, including in the following Bar Associations: Dallas, Austin, El Paso, Houston, San Antonio, Amarillo Area, and Tarrant County.⁴³

E. Historical Civility Efforts in Texas: Codes, Creed, and Dondi

In the late 1980s, the Dallas and Houston bar associations each “adopted their own version of a lawyer’s creed that set forth a code of conduct emphasizing civility over tactical advantage.”⁴⁴

In 1989, the Texas Supreme Court and Texas Court of Criminal Appeals adopted by court order their own professionalism code known as the Texas Lawyer’s Creed (the “Creed”).⁴⁵ “One of the first of its kind in the nation, the Creed established an authoritative statement of professional standards that apply to every lawyer in the state.”⁴⁶

The Creed requires civility between attorneys by, among other things, requiring that oral and written communications be “courteous, civil, and prompt.”⁴⁷ The Creed also states that attorneys will “advise [their] client[s] that civility and courtesy are expected and are not a sign of weakness.”⁴⁸

The Creed is meant to be aspirational, but it can be enforced by the courts through their inherent powers and rules already in existence, such as discovery rules.⁴⁹

Texas also serves as the home of the seminal *Dondi* case in which the U.S. District Court for the Northern District of Texas made civility mandatory within its jurisdiction.⁵⁰ In 1988, the court in *Dondi* observed “unnecessary contention and sharp practices between lawyers” that “threaten[ed] to delay the administration of justice and to place litigation beyond the financial reach of litigants.”⁵¹ As a result, the court adopted mandatory standards to remove uncivil practices by attorneys and accentuated that “a lawyer’s conduct, both with respect to the court and to other lawyers, should at all times be characterized by honesty and fair play.”⁵²

43. *See id.*

44. Smaby & Frels, *supra* note 21, at 839.

45. *Id.*

46. *Id.*

47. TEXAS LAWYER’S CREED—A MANDATE FOR PROFESSIONALISM (1989), available at <http://www.supreme.courts.state.tx.us/pdf/TexasLawyersCreed.pdf>.

48. *Id.*

49. *Id.*

50. *Dondi Props. Corp. v. Commerce Sav. Loan Ass’n*, 121 F.R.D. 284, 287–89 (N.D. Tex. 1988). Only a handful of jurisdictions, though, followed *Dondi*’s lead and made civility mandatory. Those jurisdictions include South Carolina, Florida, Arizona, and Michigan. *See Grenardo*, *supra* note 3, at 253.

51. *Dondi*, 121 F.R.D. at 286.

52. *Id.* at 289.

Although the efforts to promote civility in Texas are extensive, there can and should be more done in Texas to further civility.

IV. HOW TO FURTHER INCREASE CIVILITY IN TEXAS

A. *Teaching and Modeling Civility in Law School*

Some students come into law school with the preconceived notion that the best lawyers are rude, overbearing, and obstreperous. Law schools must disabuse law students of this notion, which is promulgated in American society by the media via television and movies.

Law schools must teach law students about the tangible benefits of civility and the severe consequences of incivility, which range from destroying one's reputation as a lawyer in the community to losing a case for a client.⁵³ Law professors and administrators must also model civility for students in the way they treat others.⁵⁴

B. *Essential Eligibility Requirements: Requiring Civility for Admission to the Bar*

Essential eligibility requirements ("EERs") are utilized by several state bars throughout the country to identify what characteristics are required for admission to their respective state bars.⁵⁵ For example, Florida requires that successful applicants possess the ability to, and show a likelihood that, the applicant will, among other things, comply with deadlines, avoid illegal acts, and conduct financial dealings with honesty.⁵⁶

Florida's EERs also make a specific reference to civil behavior, requiring that successful applicants to the bar have the ability to and demonstrate the likelihood that, in the practice of law, they will "communicate candidly and civilly with clients, attorneys, courts, and others."⁵⁷

Texas can follow Florida's lead by requiring that successful applicants for admission to the State Bar of Texas demonstrate that they will conduct themselves with civility in the legal

53. See, e.g., Douglas S. Lang, *The Role of Law Professors: A Critical Force in Shaping Integrity and Professionalism*, 42 S. TEX. L. REV. 509, 517 (2001); Elliot B. Glicksman, *Civility—A Return to Normalcy*, 74 MICH. B. J. 894, 896 (1995).

54. Sophie Sparrow, *Practicing Civility in the Legal Writing Course: Helping Law Students Learn Professionalism*, 13 LEG. WRITING: J. LEG. WRITING INST. 113, 131–32 (2007).

55. See, e.g., *Rule 5. Standards for Admission*, MINN. STATE BOARD OF L. EXAMINERS, <http://www.ble.state.mn.us/rules/Rule-5-Standards-for-Admission.aspx> (last visited July 30, 2014).

56. *Rules of the Supreme Court Relating to Admissions to the Bar*, FLA. BOARD OF B. EXAMINERS, <https://www.floridabarexam.org/web/website.nsf/rule.xsp#1-33> (last visited July 30, 2014) (Rule 3-10.1).

57. *Id.*

profession. This requirement would address the issue of incivility at the beginning of one's legal career to ensure both that uncivil individuals are steered away from the profession and also that all individuals understand attorneys must be civil to serve as lawyers in Texas, which would further infuse civility into the culture of the legal profession in Texas.

C. Mandatory Civility for All Attorneys Who Practice in Texas

Another method to increase civility in the legal profession in Texas would be to require civility for all attorneys who practice in Texas. As of today, the U.S. District Court for the Northern District of Texas, as discussed above, is the only jurisdiction in Texas that requires civility from attorneys who have cases pending before that court. Thus, civility is not mandatory for attorneys who practice in other federal courts in Texas or Texas state courts, and attorneys who only do transactional work. If civility rules were created that governed all attorneys who practice in Texas, and attorneys were subject to sanctions for uncivil behavior, then civility would further increase in Texas.

The addition of civility rules and sanctions that apply to all attorneys who practice in Texas may be advantageous, but it is highly unlikely at this time. In speaking with leaders of the civility movement in Texas, including Don Jackson, the President of TEX-ABOTA, Jonathan Smaby, and Lamont Jefferson, the improper use of motions to sanction attorney misconduct in Texas in the 1980s precipitated the need to focus on civility in Texas. As a result, motions for sanctions or additional judicial means to sanction attorney conduct throughout all of Texas are not favored in Texas by those who might be in the best position to endorse mandatory civility.

Thus, although mandatory civility for all attorneys who practice in Texas would likely increase civility in Texas, it will probably not occur anytime soon given the sensibility of leaders now in Texas who saw motions to sanction attorney conduct abused.

V. CONCLUSION

Texas has made great strides, and continues to do so, in promoting and infusing civility into the legal profession. Law schools must carry their weight in the civility movement in Texas, and all entities must continue to be vigilant in upholding and increasing civility in the legal profession.